No. 75-6527

In the Supreme Court of the United States

OCTOBER TERM, 1975

JAMES INGRAHAM, by his mother and next friend, ELOISE INGRAHAM, and ROOSEVELT ANDREWS, by his father and next friend, WILLIE EVERETT,

Petitioners,

vs.

WILLIE J. WRIGHT, I; LEMMIE DELIFORD; SOLOMON BARNES; EDWARD L. WHIGHAM; and THE DADE COUNTY SCHOOL BOARD,

Respondents.

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effec-

tive organization and administration of the public schools, and to preserve the unique American tradition of lay control, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its thirty-sixth year, National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly lay elected or appointed community representatives, responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions.

National School Boards Association submits this brief in the belief that the *en banc* decision of the United States Court of Appeals for the Fifth Circuit should be affirmed because it properly construes the Eighth and the Fourteenth Amendments, as they apply to the practice of corporal punishment in the public schools. Amicus further believes that the decision of the Court of Appeals should be affirmed because it insures the ability of the nation's school boards to govern effectively the schools entrusted to their care by the local communities to whom they are responsible. The concept of local lay control of public schools also requires that the decision of the Court of Appeals be affirmed.

The parties have, pursuant to Rule 42.2, consented to the filing of this brief.

ISSUES PRESENTED FOR REVIEW

1. Whether the cruel and unusual punishments clause of the Eighth Amendment is applicable to the administration of discipline through severe corporal punishment imposed by public school teachers and administrators upon public school children.

2. Whether the due process clause of the Fourteenth Amendment requires that the imposition of severe corporal punishment by public school teachers and administrators be preceded by notice to the student of the charges against him and an opportunity for him to be heard.

STATEMENT OF THE CASE

Amicus curiae relies on the statement of the case set forth in the brief for respondents.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution (in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

SUMMARY OF ARGUMENT

The Court of Appeals for the Fifth Circuit properly held that the Eighth Amendment's prohibition of cruel and unusual punishments is a prohibition limited to punishments that are imposed in the criminal law context. The language, history, and past applications of the Eighth Amendment demonstrate that the Court of Appeals correctly found that disciplinary actions by school personnel fall outside the scope of the Eighth Amendment. Even if the Eighth Amendment were found to apply to school discipline, however, it is clear that severe corporal punishment imposed by school officials is not a cruel or unusual punishment within the meaning of the Eighth Amendment because it is a traditional form of punishment that is widely approved by educators and laymen and does not offend basic human dignity.

The Court of Appeals also correctly held that the due process clause of the Fourteenth Amendment does not require that notice and a hearing be afforded to a student prior to the imposition of corporal punishment in the school discipline context. The Court of Appeals found that no liberty or property interest sufficient to trigger application of the Fourteenth Amendment was implicated by the facts of this case. In an attempt to discredit the reasoning of the Court of Appeals, plaintiffs now argue that the Fourth Amendment creates a right to be free from unjustified physical assaults and that this Fourth Amendment right

constitutes a liberty interest worthy of Fourteenth Amendment protection. This novel theory was not urged on the Court of Appeals. Moreover, the traditional protections embodied in the Fourth Amendment have never been considered by this Court as liberty interests within the meaning of the due process clause. A right to notice and an adversary hearing is an anomaly in the Fourth Amendment context. Even assuming, however, that the Fourth and Fourteenth Amendments would require that an adult be given notice and an opportunity to be heard in some circumstances, it does not follow that a school child should be afforded such protections in a routine disciplinary proceeding in the public schools. The constitutional rights of school children are necessarily limited by the exigencies of the educational process.

This Court has frequently recognized that our federal system places the responsibility for operation of the nation's schools in the hands of local school boards elected or appointed by the local communities to whom they are responsible. This Court has recognized that effective local lay control of the public schools requires that the federal courts should not interfere in the operation of the schools unless basic constitutional rights are directly and sharply implicated. No basic constitutional rights are implicated in this case. Moreover, if school boards should have to devote their limited resources to providing procedural safeguards in thousands of cases of sub-suspension disciplinary action, their ability to meet their responsibility for providing an adequate education for the school children of their communities would be seriously jeopardized.

For these reasons, the decision of the Court of Appeals should be affirmed.

ARGUMENT

Introduction

This case presents a question of acute importance to the continued viability of local lay control of the public schools: whether local school boards are free to determine and enforce appropriate methods of sub-suspension student discipline. Plaintiffs contend that severe corporal punishment, as a method of public school discipline, violates the Eighth Amendment or, alternatively, that the Fourteenth Amendment requires that notice and hearing be afforded to students prior to the imposition of severe corporal discipline, which they define as including "one 'lick' with a paddle." *Petitioners' Brief*, 44 n.19.

The Court of Appeals for the Fifth Circuit, sitting *en banc*, correctly held that severe corporal punishment as a method of school discipline does not violate the Eighth Amendment because the cruel and unusual punishments clause is limited in its application to punishments that are imposed in a criminal law context. *Ingraham* v. *Wright*, 525 F.2d 909, 914 (5th Cir. 1976) (*en banc*). Amicus will demonstrate that the Fifth Circuit's disposition of this issue is consistent with the language, purpose, and history of the Eighth Amendment as previously construed by this Court. Thereafter, amicus will show that severe corporal punishment is not cruel or unusual even if the Eighth Amendment is applicable to public school disciplinary activities.

The Court of Appeals for the Fifth Circuit held that the Fourteenth Amendment did not require that school children be afforded notice and an opportunity to be heard

prior to the imposition of severe corporal punishment. In order to determine whether due process requirements are applicable, this Court must first determine whether any liberty or property interest is at stake. Amicus will demonstrate that no such interest is implicated in this case. Even if such an interest were implicated here, it would necessarily be limited by the fact that the plaintiffs are school children, whose constitutional rights must be balanced against the legitimate needs of the educational process.

In Dade County, as elsewhere, corporal punishment is employed as a disciplinary tool in cases of misbehavior which merit punishment less than expulsion or suspension from school. Corporal punishment is one of a number of lesser order disciplinary remedies available to professional educators. While educators and laymen may differ as to the wisdom of corporal punishment, that question is not before this Court, which must consider only whether corporal punishment violates the Constitution. Amicus believes that severe corporal punishment does not run afoul of the Eighth Amendment and that it does not constitute a denial of liberty or property sufficient to trigger due process. Moreover, as a practical matter, amicus believes that a constitutional requirement of notice and hearing in cases of minor disciplinary action would be so burdensome a restriction on discipline in the public schools as to be unworkable. In purely economic terms, the public schools could not afford such procedures. As an educational matter, the significant diversion of resources, particularly instructional and administrative time, necessary to comply with the mandate of such procedures would be disastrous to the quality of public education in this nation. Amicus believes that both the Constitution and sound public policy require that disciplinary measures less than suspension be left in the hands of professional educators and the politically responsible local school boards to whom they report.

I.

SEVERE CORPORAL PUNISHMENT ADMINISTERED BY PUBLIC SCHOOL OFFICIALS DOES NOT VIOLATE THE EIGHTH AMENDMENT.

A. Corporal Discipline Administered By Public School Officials Is Not "Punishment" Within The Meaning Of The Eighth Amendment.

The Eighth Amendment provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In terms, the Eighth Amendment states three specific constitutional limitations on the power of the government to administer the processes of the criminal law. The framers of the Bill of Rights thought it desirable to provide the people with an explicit constitutional protection against excessive fines, bails, and punishments. Informed by the long experience of English history, the framers understood that unwarranted invasions of liberty might be accomplished through perversions of the criminal process. Their reliance on English constitutional history is demonstrated by their adoption of the exact language of the English Bill of Rights of 1689. *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 Calif.L.Rev. 839, 840-41 (1969).

Taken together, the three prohibitions of the Eighth Amendment indicate a symmetry of purpose: an unequivocal intention to limit the government's exercise of its criminal law function. Plaintiffs would have this Court ignore the textual consistency of the Eighth Amendment, with its emphasis on the criminal law, and encompass corporal discipline of school children within the scope of

the cruel and unusual punishments clause. While the concepts of fines and bails would, presumably, continue to be limited to the criminal context, the concept of punishment would be exalted to a preferred position which would encompass a multitude of punishments beyond the realm of the criminal law. The implications of such an expansion of the Eighth Amendment would be both novel and far-reaching. Once the concept of punishment is extended beyond the context of the criminal law, it is difficult to predict where its limits could safely be fixed. Given the almost unlimited range of governmental decisions which may, in some sense, have an adverse or punitive effect on citizens, plaintiffs' definition of punishment would necessarily result in application of the Eighth Amendment in a nearly unlimited variety of circumstances.

Plaintiffs' construction of "punishment" to include public school disciplinary measures is extravagant. It is both unfaithful to the language and history of the Eighth Amendment and inconsistent with the previous decisions of this Court. Plaintiffs' argument demonstrates what Mr. Justice Cardozo called "[t]he tendency of a principle to expand itself to the limit of its logic," a tendency which must be counteracted by an effort to confine the principle within the limits of its history. B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 51 (1921). Plaintiffs' expansion of the Eighth Amendment to encompass public school disciplinary measures, by wrenching "punishment" from its proper context, is inconsistent with the Amendment's purpose and history. Properly understood, "punishment" is a word of art in the Eighth Amendment; its scope is necessarily limited to those penalties which result from criminal prosecution.

In *Furman* v. *Georgia,* 408 U.S. 238, 316-22 (1972), Mr. Justice Marshall exhaustively discussed the history of the Eighth Amendment. After surveying the state of historical knowledge concerning the development of the cruel and unusual punishments clause, he concluded that:

> Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments. *Id.,* 319 (concurring opinion) (footnote omitted).

This Court has previously held, of course, that punishments need not be barbarous in themselves to run afoul of the Eighth Amendment. A punishment may be cruel and unusual if it lacks proportionality to the criminal offense for which it is imposed. *Weems* v. *United States,* 217 U.S. 349 (1910). Likewise, a punishment may be cruel and unusual if it is imposed in the absence of conduct that may properly be characterized as criminal. In *Robinson* v. *California,* 370 U.S. 660 (1962), the Court held invalid a California statute which provided a ninety day sentence for the "offense" of narcotic addiction. The Court noted that a ninety day sentence was not, in itself, a cruel or unusual punishment. Nonetheless, the Court concluded that any sentence was cruel and unusual punishment in the absence of a criminal offense. "Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Id.,* 667.

Application of the Eighth Amendment is not limited to those criminal punishments which might have been considered cruel or unusual in 1789. This Court has consis-

tently said that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems, supra* at 373. Consequently, the cruel and unusual punishments clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.,* 378. The language of the Eighth Amendment, construed in light of developing standards of humane justice, may now be thought to encompass a wider range of criminal punishments than at the time of its adoption. It must be emphasized, nonetheless, that the Court's broadening of the class of criminal punishments included within its definition of cruel and unusual has not been accompanied by any concomitant broadening of the definition of punishment to extend that concept beyond the limits of the criminal law. In this respect, the Court has meticulously followed the language and purpose of the Eighth Amendment.

In *Powell* v. *Texas,* 392 U.S. 514, 531-32 (1968), the Court said that, "The primary purpose of . . . [the cruel and unusual punishments] clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes." Although many types of civil proceedings may have a serious punitive effect on persons subject to governmental power, such punitive effects have always been considered beyond the scope of the Eighth Amendment. The Court has held, for instance, that the cruel and unusual punishments clause is inapplicable to judicial review of deportation proceedings. In *Fong Yue Ting* v. *United States,* 149 U.S. 698, 730 (1893), the Court held that:

> The order of deportation is not a punishment for crime. . . . [T]herefore . . . the provisions of the Constitution, securing the right of trial by jury, and pro-

hibiting unreasonable searches and seizures, and cruel and unusual punishments have no application.

This Court made a similar analysis of the civil contempt sanction in *Uphaus* v. *Wyman,* 360 U.S. 72 (1959). In *Uphaus,* the New Hampshire legislature had authorized the state Attorney General to investigate violations of the state's Subversive Activities Act and determine whether "subversive persons" were within the state. Uphaus, the executive director of a state-chartered corporation which was a target of investigation, refused to comply with a subpoena to produce documents relating to the activities of the corporation. The subpoena was enforced by the New Hampshire courts and Uphaus was held in contempt. The judgment of contempt ordered Uphaus to be confined until such time as he would produce the documents described in the subpoena. In this Court, Uphaus attacked the contempt on various constitutional grounds, including the Eighth Amendment. The Court found that the Attorney General's demand for the documents was valid and that the judgment of contempt for refusal to produce them was also valid. The Court further emphasized that contempt "is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *Id.,* 81 [quoting *Green* v. *United States,* 356 U.S. 165, 197 (1958) (dissenting opinion)]. The Court was unmoved by the fact that civil contempt results in incarceration, because civil contempt is not a criminal punishment within the meaning of the Eighth Amendment. While civil contempt may seriously affect the liberty of the contemner, incarceration in this context does not constitute criminal punishment.

In *Donaldson* v. *Read Magazine,* 333 U.S. 178 (1948), the Postmaster General entered an order which prevented a magazine publisher from receiving mail and cashing postal money orders because the Postmaster General believed, on the basis of evidence "satisfactory to him," that the publisher was using the mails to defraud. The publisher argued that this civil order would destroy his business and that it was cruel and unusual punishment. The Court rejected the publisher's argument:

> Its [the order's] effect is merely to enjoin the continuation of conduct found fraudulent. Carried no further than this, the order has not even a slight resemblance to punishment—it only keeps respondents from getting the money of others by false pretenses and deprives them of a right to speak or print only to the extent necessary to protect others from their fraudulent artifices. And so far as the impounding order is concerned, of course respondents can have no just or legal claim to money mailed to them as a result of their fraudulent practices.

Id., 191-92.

The effect of the Postmaster General's order was clearly punitive in the sense that it adversely affected the publisher's ability to conduct his business. It was not, however, any part of a criminal prosecution and thus did not constitute punishment within the meaning of the Eighth Amendment.

The lower federal courts have adhered to the analysis set forth in *Fong Yue Ting* and *Uphaus.* In *Santelises* v. *Immigration and Naturalization Service,* 491 F.2d 1254 (2d Cir. 1974), *cert. denied,* 417 U.S. 968 (1974), the Second Circuit denied review of a deportation order which the alien had challenged as a cruel and unusual punishment.

The court rejected the petitioner's Eighth Amendment argument "out of hand," stating that, "It is settled that deportation, being a civil procedure, is not punishment and the cruel and unusual punishment clause of the Eighth Amendment accordingly is not applicable." *Id.*, 1255-56. In *Oliver* v. *United States Department of Justice,* 517 F.2d 426 (2d Cir. 1975), *cert. denied,* ..... U.S. ....., 96 S.Ct. 789 (1976), another deportation case, the Second Circuit rejected a similar argument. The court in *Oliver* was not unmindful of the "severe consequences" which follow from a deportation order, but held that deportation is a civil proceeding and its consequences do not amount to punishment in any constitutional sense. *Accord, Chabolla-Delgado* v. *Immigration and Naturalization Service,* 384 F.2d 360 (9th Cir. 1967), *cert. denied,* 393 U.S. 865 (1968).

In *Roberts* v. *Knowlton,* 377 F. Supp. 1381 (S.D.N.Y. 1974), a cadet who had been discharged from the United States Military Academy, because he had violated the Academy's honor code, alleged that his discharge violated the cruel and unusual punishments clause. The court was unpersuaded by the cadet's argument, noting that he did not even incur an obligation to enter active military duty, and that the sum total of his "punishment" was that he would have to go elsewhere to complete his college education. "[T]he 'cruel and unusual' argument is rejected by this Court as plainly inapplicable, in the non-criminal context of this case." *Id.*, 1385. Similarly, in *Press* v. *Pasadena Independent School District,* 326 F.Supp. 550 (S.D. Tex. 1971), a school child who was suspended for violations of her school's dress code alleged that the suspension violated the Eighth Amendment. The court held that a suspension from school was not a punishment within the meaning of the Eighth Amendment which, the court said, was directed to criminal sanctions. Finally, in *Zwick* v. *Freeman,* 373 F.2d 110 (2d Cir. 1967), a commodities trader who was barred from trading because of his repeated violations of the Perishable Commodities Act, alleged that this punishment was cruel and unusual. The court disagreed on the ground that the penalty was purely civil in nature and, thus, it was not a punishment within the meaning of the Eighth Amendment.

Plaintiffs in this case rely on the Court's decision in *Trop* v. *Dulles,* 356 U.S. 86 (1958), to demonstrate that the cruel and unusual punishments clause is not limited in its application to criminal punishments. That reliance is clearly misplaced. In *Trop,* a native-born citizen who had not, in any way, voluntarily abandoned his citizenship, challenged Section 401(g) of the Nationality Act of 1940, which provided that a citizen shall lose his nationality by "[d]eserting the military or naval forces . . . in time of war, provided he is convicted thereof by court martial and as a result of such conviction is dismissed or dishonorably discharged from the service." The Court held that this section of the statute was unconstitutional because it violated the Eighth Amendment. Plaintiffs here emphasize the factual posture of *Trop*: that Trop applied for a passport, which was denied to him by "civil authorities." Although Trop's ineligibility to secure a passport resulted from his dishonorable discharge, which in turn followed from his court-martial conviction for desertion, plaintiffs argue that the punishment Trop suffered was a "civil" punishment because the final blow was struck by civil authorities. On this ground, plaintiffs argue that *Trop* expanded the scope of the Eighth Amendment's prohibition of cruel and unusual punishments to include civil as well as criminal penalties.

Clearly, the Court in *Trop* did not construe the facts or the law in this way. The punishment which was inflicted on Trop did not consist of a passport denial; the true punishment was the deprivation of his citizenship, from which the passport denial necessarily followed. Moreover, this deprivation of citizenship was a direct result of his court-martial and dishonorable discharge. In any real sense, the punishment he suffered was an additional punishment inflicted for the crime of desertion. The Court recognized this fact in the first sentence of its opinion: "The petitioner in this case, a native-born American, is declared to have lost his United States citizenship by reason of his conviction by court-martial for wartime desertion." *Id.*, 87. Mr. Justice Brennan, concurring in the judgment, noted "that the Congress has confirmed the correctness of the view that it purposed expatriation of the deserter solely as additional punishment." *Id.*, 109. The importance of this factor is underscored by the Court's opinion in *Perez* v. *Brownell*, 356 U.S. 44 (1958), which was decided on the same day as *Trop*. Like Trop, Perez had lost his citizenship pursuant to the Nationality Act of 1940. In Perez's case, however, the loss of citizenship resulted from his having voted in a foreign election, an act which was not itself a criminal offense. The Court upheld the right of Congress to deprive a citizen of his citizenship for having participated in a foreign election because that deprivation was not a criminal punishment and it was within the foreign affairs power of the Congress. In *Trop*, the Court explicitly distinguished *Perez*, by noting that the section of the Nationality Act applicable to Trop, unlike that applicable to Perez, was a "penal law," and "we must face the question whether the Constitution permits the Congress to take away citizenship *as*

a punishment for crime." *Trop, supra* at 99 (emphasis added). In *Perez*, the Court had held that Congress could divest a citizen of his citizenship for purposes unrelated to punishment. In *Trop*, the Court said that, "If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute [the desertion section] whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment." *Id.* The Court held that denationalization, as punishment for the criminal offense of desertion, was cruel and unusual.

Plaintiffs suggest that the Court's characterization of the statute in *Trop* as a "penal law" expands the definition of punishment, for Eighth Amendment purposes, beyond the criminal law context. In light of the distinction that the Court made between the cases of Perez and Trop, this argument is unpersuasive. Moreover, the Court's discussion of penal laws in *Trop* was necessitated only by the Secretary of State's contention that denationalization could never constitute punishment within the meaning of the Eighth Amendment because the Cabinet Committee which drafted the Nationality Act of 1940 had concluded that the law was not "technically" a penal law. *Id.*, 94. In effect, the Court merely asserted that its duty to expound the meaning of the Constitution could not be superseded by the legal conclusions of administrative officials. Whether a disability runs afoul of the Eighth Amendment is a judgment which must be made by the Court, not by the Congress or by administrative officials who draft legislation that is enacted by the Congress. In spite of the representations made by the draftsmen, the Court properly found that denationalization, in these circumstances, constituted an additional punishment levied for

the crime of desertion and that this punishment was cruel and unusual. When viewed in conjunction with the Court's holding in *Perez,* it is clear that *Trop* demonstrates no expansion of the Eighth Amendment's concept of punishment to include punishments or disabilities that do not flow from a criminal prosecution. In *Trop,* denationalization was clearly a punishment which resulted from a conviction for desertion and a dishonorable discharge from the Armed Forces.

In *Jackson* v. *Bishop,* 404 F.2d 571, 579 (8th Cir. 1968), the court held "that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment." Plaintiffs take comfort in *Jackson* and argue that the holding in that case should be extended to prohibit the paddling of school children. In *Jackson,* of course, the question did not arise whether the strap was a punishment for Eighth Amendment purposes because the plaintiffs in that case were prisoners, a class whose protection fell squarely within the central purpose of the Eighth Amendment. The very purpose of the Amendment was to prohibit the infliction of cruel and unusual punishments as retribution for criminal offenses. It would be futile to argue that corporal punishment in the prison situation did not constitute punishment for purposes of the Eighth Amendment. Consequently, the only question before the court was whether the punishment was cruel and unusual.

Plaintiffs contend that the Eighth Amendment must prohibit corporal punishment in schools because it prohibits at least some forms of corporal punishment in prison, and school children should not be entitled to less protection than convicted felons. This argument is appealing on an emotional level. Nonetheless, it begs the constitutional

question: whether corporal punishment in schools is punishment within the meaning of the Eighth Amendment. Amicus believes that the history and development of the Eighth Amendment demonstrate that persons subject to the processes of the criminal law are the only persons who constitute a protected class within the meaning of the Amendment. For this reason, plaintiffs' analogy fails. It is not unreasonable for the Constitution to permit corporal punishment of school children, but not hardened criminals, if the Eighth Amendment exclusively concerns limitations on criminal punishments. The Court of Appeals for the Fifth Circuit properly disposed of plaintiffs' argument:

> We do not find prisons and public schools to be analogous in the context of Eighth Amendment coverage. As discussed, *supra,* the function of the Eighth Amendment's prohibition against cruel and unusual punishments was intended to prevent the imposition of unduly harsh penalties for criminal conduct. It is not an unreasonable interpretation of the Eighth Amendment to include within its coverage discipline imposed upon persons incarcerated for criminal conduct, since such discipline is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny. To extend the *Jackson* case from a prison context to a public school situation would, however, distort the intended scope of the Amendment.

Ingraham v. *Wright,* 525 F.2d 909, 914-15 (5th Cir. 1976) (*en banc*) (footnote omitted).

Some lower federal courts have disagreed with the conclusion reached by the Fifth Circuit in *Ingraham.* In *Bramlet* v. *Wilson,* 495 F.2d 714 (8th Cir. 1974), the court held that corporal punishment of school children

might, in some circumstances, amount to cruel and unusual punishment. The persuasive authority of *Bramlet* is limited, however, because the court did not undertake any reasoned analysis as to whether corporal punishment in schools constituted punishment within the meaning of the Eighth Amendment. Plaintiffs' reliance on *Nelson* v. *Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. den.*, 417 U.S. 976 (1974), is equally unavailing. In *Nelson,* the Seventh Circuit held that severe corporal punishment of children incarcerated in a state institution for delinquents was barred by the Eighth Amendment. The institution in *Nelson* was a medium security state correctional institution for boys between the ages of twelve and eighteen years. While an estimated one-third of the residents were not criminal offenders, the court did not address the significance of the difference in status, for Eighth Amendment purposes, between those residents who were criminal offenders and those who were not. The Seventh Circuit relied on *Jackson* in holding that severe corporal punishment was barred by the Eighth Amendment. Significantly, the court noted that it did not hold "that all corporal punishment in juvenile institutions or reformatories is per se cruel and unusual." *Nelson, supra* at 355 n.6. Moreover, the defendants apparently did not suggest that a different principle should apply to non-criminal offenders within their control, and the court did not specifically consider whether *Jackson* should apply to persons who were not subject to criminal sanctions. That the court's attention was not directed to this fact can scarcely serve as precedent for the proposition that the cruel and unusual punishments clause extends beyond the area of criminal sanctions.

Other lower federal courts have concluded that school disciplinary actions do not constitute punishment within the meaning of the Eighth Amendment. In *Gonyaw* v. *Gray,* 361 F. Supp. 366, 368 (D. Vt. 1973), the district court found that a state statute providing for corporal punishment in schools did not violate the Eighth Amendment "since this amendment provides a limitation against penalties imposed for criminal behavior." The court said that, "Since neither plaintiff was punished for an offense which was criminal in nature, the Eighth Amendment does not proscribe the conduct assigned to the defendants." *Id.* The Sixth Circuit has also held that the cruel and unusual punishments clause has no application in the school disciplinary context. *Sims* v. *Waln,* 536 F.2d 686 (6th Cir. 1976).

The language, purpose and history of the Eighth Amendment consistently demonstrate that school disciplinary procedures are beyond the scope of the cruel and unusual punishments clause. For this reason, the judgment of the Court of Appeals should be affirmed.

B. Even If The Cruel And Unusual Punishments Clause Applies To School Disciplinary Proceedings, Severe Corporal Punishment Is Not Cruel And Unusual.

As this Court recently noted, "the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts." *Gregg* v. *Georgia,* ..... U.S. ....., 96 S.Ct. 2909, 2925 (1976). A punishment selected by a democratically elected legislative body is entitled to a presumption of validity. "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people." *Id.*, 2926.

In determining whether a particular punishment runs afoul of the Eighth Amendment, the Court must make two separate inquiries. First, the Court must "look to objective indicia that reflect the public attitude toward a given sanction." *Id.*, 2925. The Court must be guided by history and by public perceptions of standards of decency, such as those embodied in legislative enactments. Second, the Court must consider whether a particular punishment is excessive in a constitutional sense. *Id.* The Court must determine whether the punishment involves "unnecessary and wanton inflictions of pain"; it must also consider whether the punishment is "*grossly* out of proportion to the severity of the crime." *Id.* (emphasis added). If severe corporal punishment is punishment within the meaning of the Eighth Amendment, it must be considered in light of these tests.

1. The Historical Background And State Law Principles Of Corporal Punishment.

The entire history of American education demonstrates that school administrators and teachers have considered corporal punishment to be an acceptable and useful means of correcting student behavior and maintaining discipline in the classroom. During the colonial period, corporal punishment was regularly employed in the schools and colleges of the colonies. H. Falk, CORPORAL PUNISHMENT: A SOCIAL INTERPRETATION OF ITS THEORY AND PRACTICE IN THE SCHOOLS OF THE UNITED STATES 20 (1941). In 1789, when the Great and General Court of Massachusetts first enacted legislation enabling towns in the Commonwealth to establish independent public school districts, the principle of corporal punishment in the schools was well-established. N. Edwards & H. Richey, THE SCHOOL IN THE AMERICAN SOCIAL ORDER 110-12 (1947); S. Knezevich, ADMINISTRATION

OF PUBLIC EDUCATION 113-14 (2d ed. 1969). Throughout the nineteenth century, corporal punishment was regularly administered in the public schools. Horace Mann, the principal proponent of public education in the nineteenth century, believed that corporal punishment was a necessary element of public school discipline. *Falk, supra* at 66. The annual reports of the Boston School Committee also demonstrate the extent to which corporal punishment was employed in the public schools during that period. In the 1887-1888 school year, for instance, eighteen thousand instances of corporal punishment were reported in the Boston schools. *Id.*, 96. A 1941 empirical study demonstrates that public and professional attitudes toward corporal punishment had not changed significantly at that time: "The results of our investigation indicate that in a large proportion of schools, corporal punishment is still resorted to as a means of discipline; that public opinion, administrators of school systems, and teachers of education are divided as to its desirability; and that there is a tendency to use corporal punishment under definite limits and as a last resort." *Id.*, 137.

In 1963, two writers on school discipline noted "a growing trend throughout the country to regard a return to its [corporal punishment's] use in our schools as a partial answer to the problems of delinquency." K. Larson & M. Karpas, EFFECTIVE SECONDARY SCHOOL DISCIPLINE 146 (1963). The same writers surveyed the state of research on corporal punishment and concluded that, "Numerous studies indicate that a majority of superintendents are in favor of some form of corporal punishment." *Id.*, 149.

The legal history of corporal punishment in the schools parallels the history of educational practice. Several hundred years of common law development have resulted in

the recognition that corporal punishment is a valid form of school discipline which school personnel are legally privileged to employ, but that the degree of the punishment must be reasonable in the circumstances. *See,* Note, *Corporal Punishment in the Public Schools,* 6 Harv. Civ. Rights—Civ. Lib. L. Rev. 583, 583-84 (1971). As one commentator has suggested, this rule is based on the understanding that "once they are physically present, something must be done to protect students from each other and to maintain the integrity of the educational process." Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U.Pa.L.Rev. 545, 576 (1971). The inherent difficulty of this task requires that school personnel be given considerable discretion in determining the proper means for performing their ultimate duty to educate school children.

Moreover, this principle is consistent with generally recognized tort principles. In the absence of specific statutory limitations, "The social and moral duty of the parent, teacher or guardian to train the child, pupil or ward is of such character that it is commonly supposed that the welfare of both the child and of society require the privilege of enforcing reasonable discipline by physical chastisement." F. Harper & F. James, Jr., Law of Torts §3.20, p. 290 (1956). Generally, a teacher is privileged to employ any reasonable punishment for the proper education of the child and the maintenance of group discipline. The punishment must not be excessive and it must be reasonable in the circumstances, but severe corporal punishment is not categorically prohibited. It may be reasonable in particular cases. Harper and James succinctly summarize the test: "All the circumstances of the case, of course, are to be taken into consideration in determining the reason-

ableness of the punishment, including the nature of the child's offense, . . . the sex, age and strength of the child, the type of instrument, if any, employed in the chastisement and the nature and extent of the harm inflicted." *Id.,* 290-91 (footnote omitted).

The Restatement of Torts also recognizes the privilege of teachers to employ reasonable corporal punishment in the discipline of school children. Section 147(2) provides that:

> One other than a parent who has been given by law or has voluntarily assumed in whole or in part the function of controlling, training, or educating a child, is privileged to apply such reasonable force or to impose such reasonable confinement as he reasonably believes to be necessary for its proper control, training, or education, except in so far as the parent has restricted the privilege of one to whom he has entrusted the child.

Restatement (Second) of Torts §147(2) (1965).[1]

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[1] Section 153(2) of the Restatement recognizes that the authority of a public school official to impose corporal punishment may not be limited by parental prohibition:

> One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, notwithstanding the parent's prohibitions or wishes.

Restatement (Second) of Torts, §153(2) (1965).

In *Baker* v. *Owen,* 395 F.Supp. 294 (M.D.N.C.), *aff'd* 423 U.S. 907 (1975), this Court held, as a matter of constitutional law, that parental objections could not bar the use of corporal punishment by public school officials. As the Court of Appeals noted, this Court's review of the issues raised in *Baker* was limited to the question of parental objection. The Court did not reach any other question considered by the district court. *See Ingraham* v. *Wright,* 525 F.2d 909, 918 (5th Cir. 1976) (*en banc*).

In Section 150, the draftsmen have set out the factors which must be considered in determining whether a particular punishment is reasonable. These factors include the nature of the child's offense, his apparent motive, the influence of his example upon other children, the proportionality of the punishment to the offense, and the likelihood that the punishment will cause serious or permanent harm. *Id.*, §150. The Restatement clearly authorizes the use of severe corporal punishment in circumstances where it is appropriate. The Reporter's Notes demonstrate the emphasis which the law places on the informed discretion of the disciplinarian:

> Thus, a more severe punishment may be imposed for a serious offense, or an intentional one, than for a minor offense, or one resulting from a mere error of judgment or careless inattention. The fact that the child has shown a tendency toward certain types of misconduct may justify a punishment which would be clearly excessive if imposed upon a first offender. If one child in a family or group has shown himself to be a ringleader in misconduct, the necessity of correcting his mischievous tendencies in order that other children may not be influenced may justify a punishment more severe than would be permissible if there were no other children likely to be misled by his example. The age and sex of the child may also be important. A punishment which would not be too severe for a boy of twelve may be obviously excessive if imposed upon a child of four or five. Likewise, it may be excessive to punish a girl for a particular offense in a manner which would be permissible as a punishment for the same offense committed by a boy of the same age.

Id., comment *c*, pp. 268-69.

The reasonableness test relies on the expertise, judgment, and good faith of professional educators and politically responsible laymen who are elected to "cope with the myriad day-to-day problems of a modern public school system" and who are "accountable to the voters for the manner in which they perform." *Hortonville Joint School District No. 1* v. *Hortonville Education Association*, ... U.S. ....., 96 S.Ct. 2308, 2316 (1976). The test itself is necessarily imprecise. It recognizes that the determination of an appropriate response to particular cases of student misbehavior is not subject to a mathematically precise formulation. As one commentator has emphasized, "the decision to discipline a student is not reached in the more detached atmosphere of a courtroom but rather exclusively by a layman in or near the harried climate of the public schools, with 'bells ringing, buzzers sounding, public address systems making all those announcements, thousands of noisy adolescents pushing and shoving their way through crowded halls and stairways, locker doors banging . . . and so on.'" Wilkinson, *Goss* v. *Lopez: The Supreme Court As School Superintendent*, 1975 Sup. Ct. Rev. 25, 43.

The reasonableness test is not, of course, without risks for public school personnel. The school official acts at his peril. A course of action which, in the heat of duty, seemed reasonable to the school principal may seem unreasonable to a judge or jury with the benefit of hindsight. It is difficult to draw a precise distinction between permissible and impermissible corporal punishment. N. Edwards, THE COURTS AND THE PUBLIC SCHOOLS 611 (3rd ed. 1971). While it may be imperfect, the reasonableness test represents a classic example of the common law's ability to justly accommodate conflicting interests.

The critical fact for analysis here is that the traditional principles of tort law, as applied in the circumstances of school discipline, do not preclude the use of severe corpo-

ral punishment when that type and degree of punishment is reasonable. The reasonableness test is relevant, of course, to plaintiffs' contention that severe corporal punishment is a *per se* violation of the Eighth Amendment. In *Gregg,* the Court stated that the first step in Eighth Amendment analysis is to "look to objective indicia that reflect the public attitude toward a given sanction." *Gregg, supra* at 2925. In this case, it is appropriate to consider the response of the states to the reasonableness test.

2. Contemporary Standards.

Significantly, plaintiffs note that only Massachusetts and New Jersey have seen fit to prohibit corporal punishment by statute in the public schools. *Petitioners' Brief,* 32 n.10. The statutes of thirteen states specifically permit corporal punishment. National Education Association, REPORT OF THE TASK FORCE ON CORPORAL PUNISHMENT 24-A (1972). Moreover, according to plaintiffs' own compilation, at least twenty-three states give teachers the same authority as a parent to discipline a child or authorize the teacher to maintain order and discipline in the classroom. *Petitioners' Brief,* 31-32. General tort law principles afford to parents the privilege of using reasonable force, including severe corporal punishment when reasonable, to discipline a child. *See,* RESTATEMENT (SECOND) OF TORTS §147(1). If a teacher is privileged to use the same degree of force as a parent, it necessarily follows that a teacher is privileged to use severe corporal punishment in situations where it would be reasonable to do so. Likewise, statutes which authorize a teacher to maintain order and discipline in the classroom must be construed, in light of applicable common law principles, to authorize the use of reasonable corporal punishment.

Plaintiffs summarize this statutory evidence as suggesting popular ambivalence toward *any* corporal punishment, and a total lack of acceptance of severe corporal punishment. It is difficult to see how plaintiffs reach this conclusion. In the absence of statute, the law provides that a teacher may use reasonable force to discipline students and maintain order in the classroom. Although teachers may not use *excessive* corporal punishment, they may use *severe* corporal punishment if it would be *reasonable* in the circumstances. The overwhelming majority of state statutes merely codify this common law principle. Clearly, this adherence to common law principles does not demonstrate a lack of public acceptance of severe but reasonable corporal punishment. The evidence demonstrates the opposite.

Empirical evidence also indicates continued public and professional acceptance of corporal punishment in the schools. In 1975, for instance, the Pennsylvania Board of Education commissioned a study of corporal punishment which surveyed parents, teachers, students, school boards and administrators concerning their impressions of the effectiveness of corporal punishment as a disciplinary sanction. Seventy-five per cent of all adults responding to the Pennsylvania questionnaire favored the availability of corporal punishment as a method of student discipline and believed that it was a deterrent to student misbehavior. *See generally,* F. Reardon & R. Reynolds, CORPORAL PUNISHMENT IN PENNSYLVANIA: A REPORT TO THE PENNSYLVANIA BOARD OF EDUCATION (1975).

3. Human Dignity.

Having failed to show that severe corporal punishment violates public perceptions of standards of decency, plaintiffs next contend that corporal punishment violates the

concept of human dignity embodied in the Eighth Amendment. Plaintiffs begin with the proposition, stated in *Trop* v. *Dulles,* 356 U.S. 86, 100 (1958), that, "Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect." In *Trop,* of course, the non-traditional remedy took the form of involuntary denationalization, which was clearly a novel punishment in our jurisprudence. Plaintiffs attempt to place corporal punishment in the same classification by asserting, without any authority for the proposition, that corporal punishment in the nation's public schools is neither a traditional nor customarily imposed form of discipline. This argument is without merit. Corporal punishment has been recognized as an acceptable method of school discipline since the earliest days of American Education. H. Falk, CORPORAL PUNISHMENT: A SOCIAL INTERPRETATION OF ITS THEORY AND PRACTICE IN THE SCHOOLS OF THE UNITED STATES 20 (1941). Moreover, many teachers, educational psychologists and school administrators continue to believe that corporal punishment is a particularly useful disciplinary tool in specific circumstances.

In *Ware* v. *Estes,* 328 F.Supp. 657 (N.D. Tex. 1971), *aff'd* 458 F.2d 1360 (5th Cir. 1972), *cert. denied,* 409 U.S. 1027 (1972), for instance, the Dallas Superintendent of Schools testified that his school board had adopted corporal punishment only after the question was discussed with Professor B. F. Skinner of Harvard University, an authority on child and educational psychology. The Superintendent testified "that the District's policy on corporal punishment reflects the philosophy of Dr. Skinner, i.e., in some cases corporal punishment will be helpful." 328 F. Supp. at 659. In *Glaser* v. *Marietta,* 351 F. Supp. 555, 557

(W.D. Pa. 1972), another student discipline case, the court found that, "The expert testimony was evenly balanced, indicating that there is indeed a sharp difference of opinion among those who have done extensive work and study on the problem." In these circumstances, the court found that the wisdom of corporal punishment was not a question for the judiciary. Another authority states that, "Some students with emotional and/or behavioral problems do not respond to the counseling of the school or to less severe types of punishment. Quite often the youngster must undergo rapid improvement if he is to remain at school at all, and we cannot escape from the fact that some pupils do show a favorable change in their overt behavior after corporal punishment is administered." K. Larson & M. Karpas, EFFECTIVE SECONDARY SCHOOL DISCIPLINE 148 (1963).

Plaintiffs contend that, "Severe corporal punishment is an extreme sanction, justified only for some extreme offense, if it is permissible at all." *Petitioners' Brief,* 39. Plaintiffs then proceed to "determine whether it may be licensed" by looking to the death penalty cases for analogy. *Id.* Initially, this argument is suspect because it ignores the numerous factors which the common law has identified to determine the reasonableness of corporal punishment of school children. *See* pp. 24-26, *supra.* Plaintiffs would abandon these numerous considerations and focus entirely on the seriousness of the offense. This approach is inappropriate because it fails to take account of the fact that punishment in the educational environment is action taken in the interest of the student as well as society. The theory of school discipline is therapeutic, not retributive. Moreover, the argument assumes a definitional precision which has no basis in reality. It assumes that *severe* corporal

punishment, like the ultimate sanction of death, is an objective phenomenon which can be universally identified and agreed upon. *See* discussion *infra* at pp. 46-47.

Most important, plaintiffs' argument assumes that severe corporal punishment does not admit to degrees or variations. For purposes of plaintiffs' analysis, all severe corporal punishment must be alike in degree of severity. Indeed, in plaintiffs' view, it is uniformly draconian. Little imagination is required to recognize that an infinite variety of disciplinary circumstances may arise, in which an infinite number of different qualities of corporal punishment may be required and administered. It is precisely this infinite variety of factual circumstances which it was the genius of the common law to recognize and accommodate. Plaintiffs' "severe corporal punishment," on the other hand, is an empty concept which describes nothing.[2]

Plaintiffs contend that severe corporal punishment offends basic concepts of human dignity, and is excessive in a constitutional sense, because the suffering which it generates does not serve any valid societal purpose. While behavior modification and the maintenance of order and decorum are obviously legitimate disciplinary goals, plaintiffs believe that severe corporal punishment is not an efficient or effective means of securing these ends. On the basis of their opinion as to the efficacy of severe corporal punishment, plaintiffs would have this Court declare that it is cruel and unusual punishment. The state of public and professional opinion about reasonable corporal punishment is not, however, uniformly on one side of the issue. There is a great difference of opinion as to its utility and desirability and, in these circumstances, the Court must be reluctant to substitute its judgment for that of professional educators and politically responsible local school board members. The state of opinion here is akin to that concerning the death penalty, which was discussed by Mr. Justice White in his dissent in *Roberts* v. *Louisiana,* ..... U.S. ....., 96 S.Ct. 3001, 3016-3017 (1976) (footnote omitted):

> The debate on this subject started generations ago and is still in progress. Each side has a plethora of fact and opinion in support of its position, some of it quite old and some of it very new; but neither has yet silenced the other. I need not detail these connecting materials, most of which are familiar sources. It is quite apparent that the relative efficacy of capital punishment and life imprisonment to deter others from crime remains a matter about which reasonable men and reasonable legislators may easily differ. In this posture of the case, it would be neither a proper or wise exercise of the power of judicial review to refuse to accept the reasonable conclusions of Congress and 35 state legislatures that there are indeed certain circumstances in which the death penalty is the more efficacious deterrent of crime.

It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This

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[2]Although plaintiffs attempt to distinguish routine corporal punishment from severe corporal punishment, that distinction is clearly impossible to make on an objective basis. Nonetheless, if plaintiffs' theory is accepted by this Court, school officials will be required to make that distinction at the risk of constitutional liability. "These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable." *Wood* v. *Strickland,* 420 U.S. 308, 329 (1975) (Powell, J., concurring in part and dissenting in part) (footnote omitted). The effect of this burden will likely be a reluctance on the part of school officials to take vigorous action to maintain discipline.

> concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere. The issue is not whether, had we been legislators, we would have supported or opposed the capital punishment statutes presently before us. The question here under discussion is whether the Eighth Amendment requires us to interfere with the enforcement of these statutes on the grounds that a sentence of life imprisonment for the crimes at issue would as well have served the ends of criminal justice. In my view, the Eighth Amendment provides no warrant for overturning these convictions on these grounds.

While some educators may believe that corporal punishment is an unacceptable method of maintaining school discipline, the evidence shows that a majority of state legislatures do not share that opinion. For the most part, the states follow the traditional rule that school officials may use reasonable corporal punishment. In some circumstances, that punishment may necessarily be severe. The state legislatures, state boards of education and local school boards follow this principle. Plaintiffs have not met their very heavy burden of showing that the use of reasonable corporal punishment is so devoid of reason as to deny the existence of any valid societal purpose. In the absence of such a showing, the informed judgment of local officials must stand. The wisdom of corporal punishment is a question within the competence of the people and their elected officials. In the school situation, these facts attain particular significance because "public education in our Nation is committed to the control of state and local authorities" and "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

Plaintiffs contend, finally, that the particular punishments which form the subject matter of this action violated the Eighth Amendment, even if all severe corporal punishment is not cruel and unusual. In this respect, it is important to note that the trial court dismissed the complaint in this action only after the close of plaintiffs' case. The district court heard the live testimony of the students who allegedly received the punishments at issue. The plaintiffs also called an expert witness to testify on the effects of corporal punishment, and they entered into a stipulation regarding the opinions of the two physicians who examined James Ingraham. *Appendix,* 20-23. Dr. Whigham, the Superintendent of Schools, testified concerning the theory and practice of corporal punishment in the Dade County School System. *Appendix,* 28-57. He was subject to full and effective examination and cross-examination. The trial court had ample opportunity to judge the credibility and demeanor of a number of witnesses, many of whom testified about the facts of specific punishments that were allegedly inflicted on class members during the class period. From this evidence, the court concluded that, for the most part, "the punishments administered have been unremarkable in physical severity." *Appendix,* 152.

Moreover, the trial court must have weighed the evidence most favorably to the plaintiffs because the court assumed that the Eighth Amendment applied in the school context and that corporal punishment could be sufficiently severe to violate the Constitution. The Court said:

> Corporal punishment might be meted out under such circumstances and with such severity as to amount to a deprivation of a constitutional right and thus give rise to recovery in a "civil rights" case.

Appendix, 148.

Even applying this legal standard, however, the trial court went on to find, as a matter of fact, that the punishments forming the basis of the action were not sufficiently grave to constitute cruel and unusual punishment. The trial court noted that Ingraham's case rested on one instance of punishment, during which he received 20 licks with a wooden paddle, and that Andrews was paddled several times, receiving no more than five licks on any one occasion. The court concluded that, "The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring 'punishment' to the constitutional level of 'cruel and unusual punishment.'" *Appendix,* 148-149.

In effect, plaintiffs' only grievance with the trial court's decision is that it judged plaintiffs' evidence inadequate to support their legal theory, which the trial court accepted as correct. Without reference to whether the trial court's findings are clearly erroneous, plaintiffs now attempt to relitigate those factual issues in this Court. They argue that the whole pattern of punishment at Drew Junior High School lacked any educational justification, served no societal purpose, resulted in gratuitous inflictions of suffering, and was so excessive as to violate the Eighth Amendment. The principal obstacle to this analysis lies in the contrary factual conclusions of the trial judge in this case, who heard all the evidence first-hand and weighed it in light of the legal standard most favorable to plaintiffs' case. It would be improper for this Court to set aside those factual conclusions.

Plaintiffs' contention that severe corporal punishment violates the Eighth Amendment is without merit and the judgment of the Court of Appeals must be affirmed.

II.

SEVERE CORPORAL PUNISHMENT, IN THE ABSENCE OF NOTICE AND AN OPPORTUNITY TO BE HEARD, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. No Liberty Or Property Interest Is Implicated By The Use Of Severe Corporal Punishment As A School Disciplinary Measure.

The Due Process Clause of the Fourteenth Amendment provides that the government may not deprive citizens of liberty or property without due process of law. To determine whether due process applies, the threshold inquiry must consider whether a protected liberty or property interest is at stake. In *Goss* v. *Lopez,* 419 U.S. 565 (1975), for instance, the Court found that Ohio had created a property interest in education and that this interest could not be wholly withdrawn, even for a short period of time, without minimal due process. The students in *Goss* had been suspended from school for periods up to ten days, without notice or an opportunity to be heard. This Court held that "A 10-day suspension from school is not *de minimis* in our view and may not be imposed in complete disregard of the Due Process Clause". *Id.,* 576. In determining what process was due, the Court carefully considered the special characteristics of the educational process and concluded that notice and an opportunity to be heard were required, but that notice need not be afforded prior to the hearing and that the hearing itself need only be "an informal give-and-take between student and disciplinarian." *Id.,* 584. *See* Wilkinson, *Goss* v. *Lopez: The Supreme Court As School Superintendent,* 1975 Sup. Ct. Rev. 25, 40. Plaintiffs concede that the state-created property interest

in public education, which formed the basis for decision in *Goss*, is not implicated by the facts of this case.[3] Plain-

[3] In *Paul* v. *Davis*, ... U.S. ....., 96 S.Ct. 1155, 1165 (1976), the Court explained the doctrinal source of liberty and property interests:

> It is apparent from our decisions that there exist a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. (Footnote omitted).

Once the State has granted a specific property interest, it may not remove or significantly alter that interest without compliance with the requirements of due process. It is clear, nonetheless, that the state has an absolute right to determine the parameters of the property interest when it is initially bestowed: the property interest created is that which the state chooses to create. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The Court recently reaffirmed this principle in *Bishop* v. *Wood*, ... U.S. ....., 96 S.Ct. 2074, 2077-78 (1976) in which it held that "the sufficiency of the claim of entitlement [to continued public employment] must be decided by reference to state law."

Plaintiffs are unable to show that a property interest is affected here. The state legislature has created a property interest in education, but it has also explicitly limited that property interest by providing that students may be subject to corporal punishment. Fla.Stat.Ann. §232.27. While the state has granted the right to attend public school, it has not granted immunity from corporal punishment as part of that right. Indeed, it has explicitly provided the opposite by statute. Unlike *Goss* v. *Lopez*, 419 U.S. 565 (1975),

(Footnote continued)

tiffs emphasize that, "The right involved in this case is the right to liberty." *Petitioners' Brief*, 43.[4]

A liberty interest, within the meaning of the Due Process Clause, may be created by state law or by one of the provisions of the Bill of Rights which has been "incorporated" into the Fourteenth Amendment. *Paul* v. *Davis*, ... U.S. ....., 96 S.Ct. 1155 (1976); *Meachum* v. *Fano*,

(Footnote continued)

the property interest here has not been withdrawn in any sense; it has merely been regulated according to the terms on which it was initially granted. Moreover, the purpose of corporal punishment is to maintain order and discipline by means calculated to maintain the student's property interest. Corporal punishment seeks to affect unsatisfactory behavior within the school environment rather than remove the student from that environment. Insofar as property is concerned, *Goss* does not restrict the state's ability to impose reasonable methods of discipline within the schoolhouse. The state has established the right to attend school and it may determine the contours of that right. *See Bishop, supra*, 96 S.Ct. at 2077-78.

[4] Somewhat inconsistently, plaintiffs suggest that a property interest may be at stake after all because James Ingraham's injuries resulted in his absence from school for a short period of time. *Petitioner's Brief*, 45. Plaintiffs seem to argue that this purely fortuitous element of Ingraham's punishment resulted in a de facto suspension which, under *Goss* v. *Lopez*, 419 U.S. 565 (1975), requires that the action taken be preceded by notice and hearing. While this argument may have some superficial appeal, it is clear that the degree of injury suffered by James Ingraham was unprecedented. Plaintiff's contention overlooks the very essence of corporal punishment: the purpose of corporal punishment is not to remove a child from school, its purpose is to affect his behavior so that he will be able to continue in school. In these circumstances, it would be odd indeed for the Constitution to require notice and opportunity to be heard prior to the imposition of corporal punishment on the ground that the punishment may, in an extremely rare case, result in the occurrence which the punishment imposed seeks to avoid.

..... U.S. ....., 96 S.Ct. 2532 (1976). Plaintiffs concede that no state-created liberty interest entitled them to the protection of the Due Process Clause because Florida law has created no liberty interest that could be damaged by the use of corporal punishment in the schools. Indeed, Florida law explicitly authorizes the use of corporal punishment as a form of discipline in the public schools. Fla. Stat. Ann. §232.27.

According to plaintiffs' argument, the liberty interest involved here is the "right to be free from unjustified physical assaults," which they say is grounded in the Fourth Amendment. *Petitioners' Brief,* 43. Plaintiffs broadly construe the Fourth Amendment as if it afforded constitutional protection to the common law right of freedom from interference with the person. It is readily apparent, of course, that this theory is inconsistent with *Screws* v. *United States,* 325 U.S. 91, 108-09 (1945), in which Mr. Justice Douglas said that, "The fact that a prisoner is assaulted, injured or even murdered by state officials does not necessarily mean that he is deprived of any right protected by the Constitution or laws of the United States." In *Paul* v. *Davis,* ..... U.S. ....., 96 S.Ct. 1155, 1160 (1976), the Court quoted this language with approval and rejected the theory that the Due Process Clause should extend to citizens the "right to be free of injury wherever the state may be characterized as the tortfeasor." The Court noted that the civil rights statutes do not constitute "a body of general federal tort law." *Id.,* 1160. Likewise, in *Johnson* v. *Glick,* 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied, Employee-Officer John* v. *Johnson,* 414 U.S. 1033 (1973), Judge Friendly noted that, "Certainly the constitutional protection is nowhere nearly so extensive as that afforded by the common law tort action for battery, which makes actionable any intentional and unpermitted contact

with the plaintiff's person or anything attached to it and practically identified with it, see Prosser, Torts §9 (4th ed. 1971); still less is it as extensive as that afforded by the common law tort action for assault, redressing 'Any act of such a nature as to excite an apprehension of battery.'" The court concluded that "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Id.*

In *Paul,* the Court explained that its reluctance to expand the scope of the Due Process Clause to encompass a remedy for all torts cognizable under state law was not inconsistent with its holding in *Monroe* v. *Pape,* 365 U.S. 167 (1961), because the complaint in *Monroe* "alleged an unreasonable search and seizure which violated specific guarantees 'contained in the Fourth Amendment.'" *Paul, supra* at 1160. In the present case, plaintiffs attempt once again to create a general body of federal constitutional tort law. Because the Court has foreclosed the possibility of plaintiffs' reaching that result through less subtle means, plaintiffs now seek to expand the meaning of the Fourth Amendment to encompass the right to be free from physical interference, a right which has traditionally been a matter of tort law within the jurisdiction of the states. Plaintiffs re-christen this common law right as a liberty interest—"the right to be free from unjustified physical assaults"—and proceed to argue that it is sufficient not only to state a claim under Section 1983, but also to mandate procedural protections before the state may act. This argument must surely fail.

The central meaning of the Fourth Amendment is to guarantee the right of the people to be secure in their persons, papers, houses and effects, against unreasonable searches and seizures. Only tortured linguistic analysis would suggest that corporal discipline of public school

children is either a search or a seizure within the meaning of the Fourth Amendment. Indeed, plaintiffs put forth no argument to show that corporal punishment constitutes either a search or a seizure. Instead, they attempt to extract from the "spirit" of the Fourth Amendment a generalized right to be free from unjustified assaults. They are unable to provide any authority for this new constitutional right, either directly or by analogy. Although *Monroe* would seem to provide a fertile ground for analysis, plaintiffs studiously ignore *Monroe* because this Court, in *Paul,* emphasized that the earlier case was a search and seizure case and explicitly rejected the notion that it stands for such a broad principle. *Paul, supra* at 1160. Instead, plaintiffs emphasize the Court's observation in *Schmerber* v. *California,* 384 U.S. 757, 767 (1966), that, "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State," as well as similarly broad language in *Terry* v. *Ohio,* 392 U.S. 1, 24-25 (1968).[5] While this language appears felicitous for plaintiffs' argument in the abstract, the context of both cases indicate that the language is

[5] In *Terry,* the Court said:

> Even a limited search of the outer clothing for weapons constitutes a severe, though brief intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.

Id., 24-25.

While the Court spoke of "cherished personal security" in *Terry,* its observation must be considered in terms of the factual context of that case. The security it noted was not an amorphous or generalized sense of personality, but rather the traditional Fourth Amendment right to be secure against unreasonable searches and seizures. Properly considered, this language does not support plaintiffs' contention that the Fourth Amendment should be broadly construed to encompass the right to be free from all unwarranted physical intrusions.

wholly inapposite to the broad theory which plaintiffs attempt to extract from the Fourth Amendment.

Both *Terry* and *Schmerber* were classic search and seizure cases. In neither case was there any question about the application of the Fourth Amendment to the particular governmental activities involved. In *Terry,* the Court recognized that the stop and frisk technique used by the police officer amounted to both a seizure of the person and a search incident to the seizure. The Court nonetheless upheld the privilege of a police officer to stop and frisk a citizen without a warrant, even though this action represented "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Terry, supra* at 17. In *Schmerber,* the Court likewise upheld the warrantless extraction of a blood sample from the body of a criminal suspect. The extraction of blood from a suspect's body was clearly a search within the meaning of the Fourth Amendment, but the Court held that it was not unreasonable in the circumstances. Neither *Terry* nor *Schmerber* supports the broad Fourth Amendment right to freedom from physical interference which plaintiffs now ask this Court to sanction. In the past, moreover, the Court has held that the protection of the Fourth Amendment extends only to unreasonable searches and seizures; it has consistently declined to transform the Fourth Amendment into a more generalized guarantee of privacy.

In *Katz* v. *United States,* 389 U.S. 347, 350 (1967), the Court said that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" Moreover, the Court acknowledged that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the in-

dividual states." *Id.*, 350-351 (emphasis in original) (footnotes omitted). The general right to be free from interference with the person is no more a part of the Fourth Amendment protection against unreasonable seizures and searches than was the generalized right to privacy that was unsuccessfully urged upon the Court in *Katz*. Indeed, the right to be free from interference with the person is, like the right to privacy, a creature of state law. Having failed to show that corporal punishment is a search or a seizure, in a constitutional sense, plaintiffs' Fourth Amendment argument must fall.

Even if the Fourth Amendment could be construed as a general prohibition against physical interference, that prohibition could not, consistently with the language of the Fourth Amendment, be absolute. Whatever protection the Fourth Amendment affords must be limited to intrusions that are unreasonable. An absolute freedom from physical interference would necessarily be inconsistent with the social interaction implicit in the nature of civil society and our "concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). The limitations which the law places on a citizen's physical liberty are both numerous and substantial. A citizen may be required, for instance, to submit to vaccination, regardless of his personal beliefs or preferences. *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). His attendance at a state university may be conditioned on his participation in a military training program which is repugnant to his religious principles. *Hamilton* v. *Regents of the University of California*, 293 U.S. 245 (1934). He may be stopped and frisked whenever a police officer reasonably fears for his own safety or the safety of others. *Terry, supra.* In some circumstances, he may be arrested without a warrant if the police officer has probable cause. *Trupiano* v. *United States*, 334 U.S. 699 (1948). Of greatest

significance, perhaps, is that a woman's right to freedom from physical interference does not include the absolute right to an abortion. *Roe* v. *Wade*, 410 U.S. 113 (1973).

Plaintiffs attempt to deal with this element of the Fourth Amendment by arguing that the amendment protects against *unjustified* physical assaults. Even assuming that this statement is accurate and that paddling is an assault, plaintiffs make no effort to demonstrate that paddling would be unjustified. In light of the pervasive historical evidence supporting the privilege of school personnel to use reasonable corporal punishment to maintain discipline and order, plaintiffs must shoulder the burden of demonstrating that it is unjustified. They have failed to do so. Plaintiffs had a full hearing in the district court. They had an opportunity to present evidence to show that the infringement placed on their alleged Fourth Amendment right to physical integrity was unreasonable. The record does not reveal any evidence directed to this issue, except for the expert testimony which questioned the efficacy of corporal punishment as an educational tool. The two opinions of the Court of Appeals also indicate that the Fourth Amendment argument was not made in that court. Plaintiffs' failure to make this novel argument until this stage of the proceedings increases the difficulty of analysis. Nonetheless, the widespread historical and contemporary acceptance of corporal punishment as a means of school discipline would seem to indicate that this invasion of plaintiffs' liberty is not *per se* unreasonable. Moreover, the Dade County Superintendent of Schools testified in the district court that he believed corporal punishment served an important disciplinary function in circumstances where disciplinary action was required, but suspension would be unmerited. He said:

> With reference to the two [forms of punishment] that you specified there, suspension or expulsion versus corporal punishment; suspension or expulsion would terminate either temporarily or for a longer period of time, the education of the youngster, and he [the administrator] needs to weigh that step, which is a very serious step, against whether the corporal punishment would, in fact, bring some improvement in the situation; whether it is a useful procedure or technique with this particular youngster and that particular situation.

Appendix, 51.

Indeed, plaintiffs seem to concede that corporal punishment is neither *per se* unreasonable nor a *per se* violation of the Fourth Amendment. To make their argument appear more reasonable, plaintiffs distinguish between *mere* corporal punishment and *severe* corporal punishment; they argue that the latter violates the Fourth Amendment while the former does not. Their definition of severe corporal punishment is extremely unorthodox. For purposes of Fourth Amendment analysis, plaintiffs state that, "We do not include a brief hand spanking or a slapped face within the definition of 'severe' corporal punishment. But one 'lick' with a paddle . . . is 'a severe though brief intrusion upon cherished personal security.'" *Petitioners' Brief,* 44 n.19. This definition of the liberty interest at stake in school discipline is obviously artificial. Moreover, the definition is inconsistent with the generally recognized tort principles which plaintiffs seek to elevate to constitutional status. If plaintiffs' interest consists in being free from unjustified physical assaults, it is irrational to define that interest in terms of the instrument used to invade it, rather than in terms of the nature of the interest itself. One must wonder at the logic of an argument which supposes

that one stroke of a paddle on the buttocks is more likely to affront a person's sense of human dignity than a slap across the face. One proponent of increased judicial review of school discipline decisions has noted that, "A de minimis level exists here as elsewhere; a swat on the bottom is not inherently harmful to either the anatomy or the psyche." Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U.Pa. L.Rev. 545, 583 (1971). At the same time, a slap on the face has traditionally been considered to be the most provocative type of battery. Plaintiffs' attempt to show that severe but reasonable corporal punishment violates the Fourth Amendment must fall by the weight of its own irrationality.

In a final desperate attempt to demonstrate the existence of a liberty interest in this case, plaintiffs state that James Ingraham suffered a loss of reputation among his brothers and sisters because of the discomfort which he suffered in his buttocks. *Petitioners' Brief,* 47. That a child should have a constitutional interest in not being teased by his siblings is a novel proposition indeed. In *Paul* v. *Davis,* ..... U.S. ....., 96 S.Ct. 1155 (1976), the Court held that the subject of a police bulletin on "active shoplifters," which was circulated to all commercial establishments in Louisville, did not have an actionable claim for defamation under Section 1983. The Court noted that any harm or injury to reputation which the plaintiff may have suffered, "even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws." *Id.,* 1166. Consequently, the Court held that a mere interest in reputation "is neither 'liberty' nor 'property' guaranteed against state depriva-

tion without due process of law." *Id.* If the substantial damage to reputation a citizen suffers by being branded as an "active shoplifter" is insufficient to trigger due process, it is frivolous to suggest that a youngster's reputation among his brothers and sisters is entitled to constitutional protection on the same theory.

Plaintiffs have failed to demonstrate the existence in this case of any liberty interest that would require protection under the Due Process Clause.

B. Plaintiffs Have Demonstrated No Liberty Interest Which Would Entitle Them To Notice And An Opportunity To Be Heard Prior To The Imposition Of Corporal Punishment.

Even if plaintiffs were able to persuade this Court that the Fourth Amendment should be expansively construed to encompass a general liberty interest in freedom from assault, it does not follow that plaintiffs would have a Fourteenth Amendment right to notice and an opportunity to be heard prior to the administration of corporal punishment. It is beyond dispute that the possible infringement of many types of liberty interests may require that the affected citizen be given notice and an opportunity to be heard. Indeed, Judge Friendly has recently suggested that, "Particularly after *Goss* v. *Lopez* it becomes pertinent to ask whether government can do *anything* to a citizen without affording him 'some kind of hearing.'" Friendly, *"Some Kind of Hearing,"* 123 U.Pa.L.Rev. 1267, 1275 (1975) (emphasis added). Nonetheless, this Court has recently rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum* v. *Fano,* ..... U.S. ....., 96 S.Ct. 2532, 2538 (1976) (emphasis in original). In determining whether the Due Process

Clause should be applied in a particular situation, it is necessary to consider both the nature of the interest asserted and the administrative context in which it is asserted. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring). Inasmuch as the plaintiffs base their alleged constitutional right to freedom from assault on the Fourth Amendment, it is necessary to examine the type of protection usually afforded to liberty interests created by the Fourth Amendment.

In its more orthodox applications, a citizen's Fourth Amendment liberty interest has not been construed to require prior notice and hearing, pursuant to the Due Process Clause of the Fourteenth Amendment, before the government may act to take it away. For instance, a police officer may stop and frisk a citizen when the officer reasonably fears for his own safety or the safety of others. A stop is clearly a seizure, and a frisk is a search. Together, they amount to a significant invasion of the citizen's liberty; they "may inflict great indignity and arouse strong resentment." *Terry, supra* at 17. It is clear, nonetheless, that a citizen has no right to prior notice or hearing in these circumstances. Likewise, a police officer may sometimes arrest a suspect upon his own determination of probable cause, without securing a warrant for the citizen's arrest. The resulting deprivation of liberty will, at least temporarily, be total. The collateral effects may be serious. "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein* v. *Pugh,* 420 U.S. 103, 114 (1975). Nonetheless, a citizen may be arrested and confined without prior notice or an opportunity to be heard. Finally, the warrant process itself does not afford notice and hearing. A probable cause hearing before an impartial magis-

trate is an *ex parte* proceeding; the suspect has no right to notice and he has no "opportunity," to use plaintiffs' words, "to tell his side of the story." *Petitioner's Brief,* 51. In short, the Fourth Amendment right to liberty is a special right. The right itself is not absolute because the Fourth Amendment protects only against "unreasonable" searches and seizures. Moreover, it is always limited in its enforcement by the exigencies of the criminal law context and it has never been construed to require notice and an opportunity to be heard.

Traditionally, remedies for the unwarranted invasion of Fourth Amendment rights have been limited to the granting of retrospective relief. Police officers who act without probable cause or use excessive force may be subject to state criminal prosecution. They may also be subject to civil liability under state tort law or in some cases, the federal civil rights acts. *See Monroe* v. *Pape,* 365 U.S. 167 (1961). Evidence that is improperly seized may be excluded at a subsequent criminal trial. *Mapp* v. *Ohio,* 367 U.S. 643 (1961). The only mechanism available to protect Fourth Amendment rights on a prospective basis is the probable cause hearing which does not, however, grant the citizen any prophylactic relief in the sense of an opportunity to be heard pursuant to notice. Against this traditional background of retrospective protection of Fourth Amendment rights, it is clear that plaintiffs now seek to have this Court sanction a previously unrecognized right to physical integrity under the Fourth Amendment and they seek to protect that right by legislating a new prophylactic rule unknown in the Fourth Amendment area. It is difficult to believe that the alleged invasion of Fourth Amendment rights in the school discipline context should require more elaborate safeguards than those available in the criminal law context.

In determining whether this rule should be adopted to protect plaintiffs' alleged Fourth Amendment liberty interests, in the school discipline context, this Court must consider both the nature of the alleged liberty interest at stake and the peculiar features of the particular administrative context in which the interest is asserted. Mr. Justice Frankfurter has described the nature of this balancing process:

> It may fairly be said that, barring only occasional and temporary lapses, this Court has not sought unduly to confine those who have the responsibility of governing by giving the great concept of due process doctrinaire scope. The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Joint Anti-Fascist Refugee Committee v. *McGrath, supra* at 163 (Frankfurter, J., concurring) (citations omitted).

In *Meachum* v. *Fano,* ..... U.S. ....., 96 S.Ct. 2532 (1976), the Court recently expressed its approval of the principle that Due Process analysis requires consideration of the nature of the particular administrative context as well as the liberty interest at stake. In *Meachum,* a number of Massachusetts state prisoners challenged the constitutional adequacy of administrative procedures which resulted in their transfer to different institutions, where the

conditions of their confinement were concededly more disagreeable than they had been at their former prison. The Court was asked to determine whether "*any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protection of the Due Process Clause." *Id.*, 2538 (emphasis in original). While the Court noted the necessarily limited nature of a prisoner's liberty interest, it did not rest its decision on that basis alone. The Court has previously asserted that prison regulations require "a reasonable accommodation between the interests of the inmates and the needs of the institution." *Wolff* v. *McDonnell,* 418 U.S. 539, 572 (1974). In *Meachum,* the Court found it necessary to look beyond the "substantial adverse effect" of the administrative action involved to the effect that recognition of procedural protections would necessarily have on the administrative process. "[T]o hold as we are urged to do that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum, supra* at 2538. The Court noted that decisions concerning institutional transfers are made for a variety of reasons and "often involve no more than informed predictions as to what would . . . best serve institutional security or the safety and welfare of the inmate." *Id.* Moreover, "[h]olding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges." *Id.*, 2540.

In *Meachum,* the Court declined to involve itself in secondary level decision-making in the prison context. The reasons which support that approach in the prison context are equally forceful in the case of public school disciplinary proceedings which do not entail suspension or expulsion from the institution. The Court has consistently recognized that:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and *which do not directly and sharply implicate basic constitutional values.*

Epperson v. *Arkansas,* 393 U.S. 97, 104 (1968) (emphasis added) (footnote omitted).

It is appropriate for the federal courts to intervene in school disciplinary decisions when the sanction amounts to a withdrawal of the important privilege of public school attendance. *Goss* v. *Lopez,* 419 U.S. 565 (1975). It is neither appropriate nor necessary, however, for the federal courts to become enmeshed in disciplinary decisions that involve purely intramural sanctions of transient significance, such as corporal punishment. These decisions are properly the concern of state and local officials and are subject to adequate review in the state courts. "We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require judicial review for every such

error." *Bishop* v. *Wood*, ... U.S. ....., 96 S.Ct. 2074, 2080 (1976).[6]

This Court has frequently recognized that the constitutional rights of students are not absolute. They are limited in the first instance because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944). *See also, McKiever* v. *Pennsylvania*, 403 U.S. 528 (1971); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Byofsky* v. *Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975). They are further limited in the school context because they must be balanced against the needs of the educational institution whose principal duty is to impart knowledge. Even in the special area of First Amendment freedom, this Court has recognized that the rights of both teachers and students must be "applied in light of the special characteristics of the school environment." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506 (1969).

[6] If plaintiffs' theory is accepted, it would be unreasonable to provide due process protections when the sanction is corporal punishment, but to withhold them in the case of other, at least equally punitive sanctions. The purpose of corporal punishment is to impose a less serious punishment than suspension or expulsion. It is one of many disciplinary measures potentially available. It is by no means the most serious or lasting in its effects. Decisions to make a student stay after school every day for a week, to give a student a less than superior grade, to not play a high school athlete on the day a college football recruiter is in the stands could all have a more serious effect on a student's future than the infliction of even the most severe paddling. *See Dallam* v. *Cumberland Valley School District*, 391 F.Supp. 358 (M.D. Pa. 1975); *Zeller* v. *Donegal School District Board*, 517 F.2d 600 (3rd Cir. 1975) (*en banc*). The difficulty of fixing a constitutional limitation to plaintiffs' theory is demonstrated by the distinction they attempt to draw between paddling, which they find unconstitutional, and a slap on the face, which they find acceptable. *See Petitioner's Brief*, 44 n.19.

The exigencies of school discipline are obvious. As Mr. Justice Powell noted in *Goss*, "[i]t is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years." *Goss, supra* at 591-592 (Powell, J., dissenting) (footnote omitted). At the same time, securing adequate financial resources to carry on the educational business of the schools has become an increasingly difficult task for state and local officials. To the extent that procedural requirements are imposed on the school disciplinary process, these scarce resources will necessarily be diverted from the primary business of academic instruction and the quality of education in our public schools will suffer. "The cost of supporting discipline proceedings cannot be dismissed lightly by contrasting its 'economic' character to the 'human' dimension represented by the threat to the student's liberty, for the economic costs of fairer disciplinary procedures necessarily result in a shifting of scarce resources from the purposes to which they would otherwise be put." Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U.Pa. L.Rev. 545, 574 (1971). This fact is worth serious consideration in determining whether due process requires notice and an opportunity to be heard in cases of minor discipline problems that result in a sanction less severe than suspension. The danger cannot be overemphasized. Mr. Justice Powell noted in *Goss* that statistical evidence concerning the number of school suspensions in the country "demonstrate[s] that if hearings were required for a substantial percentage of short-term suspen-

sions, school authorities would have time to do little else." *Goss, supra* at 592 (Powell, J., dissenting).[7]

If a hearing requirement is applied to lesser disciplinary sanctions such as corporal punishment, the amount of school time devoted to discipline will again increase by a geometric proportion. The danger with this approach is, of course, that greater procedural rights may result in severer sanctions which school officials would not inflict if they were allowed to exercise their professional judgment in discipline matters. The most obvious way to cope with the increased costs of disciplinary proceedings would be a greater reliance by school officials on the ultimate sanction of suspension or expulsion. If the same procedures must accompany minor disciplinary proceedings, school officials may be driven by economic necessity to choose the more serious sanction because of its greater

[7] If the Court were to hold that only the imposition of *severe* corporal punishment constitutionally requires notice and hearing, an intolerable practical burden would be placed on school personnel. The severity of corporal punishment is never self-evident in that it depends on circumstances such as the age and disposition of the student, the conduct for which he is liable to punishment, and the degree of force to be applied. Plaintiffs contend that a slap on the face is not severe corporal punishment while one lick with a paddle is severe corporal punishment. If nothing else, plaintiffs' argument demonstrates the impossibility of making categorical distinctions here. Yet, plaintiffs would fix constitutional liability on this fragile distinction. Inasmuch as school officials would be forced to make disciplinary decisions that would require them to run the risk of "predicting the future course of constitutional law," *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975), *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967), it is likely that they would simply adopt the undesirable policy of granting hearings in every case. This result would preclude effective school discipline.

general and special deterrence value. This result would be undesirable because it would impose on school officials artificial criteria for making disciplinary decisions when society, the school and the student would, doubtlessly, best be served by an exercise of the school official's informed professional judgment. *See* Wilkinson, *Goss* v. *Lopez: The Supreme Court As School Superintendent*, 1975 Sup.Ct. Rev. 25, 62. This Court must ever be mindful of the continuous accounting which professional educators must give to their local school boards who are, in turn, constantly audited by the communities which choose them. "[I]f the work of the schools is to go forward," the federal courts must not needlessly prevent the "conscientious school decision-maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." *Wood* v. *Strickland*, 420 U.S. 308, 320-321 (1975).

The matters which plaintiffs now seek to have heard in a federal court are matters within the special interest and competence of the states, which must be "left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971). Moreover, it is not an area in which the states have stood idle.

Several hundred years of common law development as well as the legislative enactments of the several states, have set out both the limits of the student's interest in his physical integrity and the privilege of those who are responsible for the education of the student and his schoolmates. The result of these developments has been a delicate accommodation of the interests of the individual, his schoolmates and society. The majority of jurisdictions, by statute or by adherence to common law principles, permit a teacher to take immediate disciplinary action and,

if necessary, administer reasonable corporal punishment. The teacher acts, of course, at his peril. If the punishment that he inflicts is later found to be excessive, he will be subject to possible civil and criminal liability. *See* E. Ruetter & R. Hamilton, Law of Public Education, 514-18 (1970); N. Edwards, The Courts and the Public Schools 610-15 (3rd ed. 1971).

The uniform consensus of courts and legislative authorities has been to effect this delicate balance of interests through the imposition of civil or criminal liability after the fact, rather than by placing a prior restraint, in the form of prophylactic procedural safeguards, on the school official's exercise of his lawful discretion. This approach is justified by the fact, as plaintiffs note, that the teacher's abuse of this privilege is an exceedingly rare event. *Petitioners' Brief,* 48. It does not make sense, then to encumber the educational process with costly procedures designed to thwart an abuse of discretion that almost never occurs.

Plaintiffs now seek, however, to constitutionalize this area of sub-suspension disciplinary action by unnecessarily extending the rationale of *Goss* and, thereby, cast aside many years of judicial and legislative experience in supervising discipline in the public schools. The mechanism for accomplishing this objective is to reconceptualize the traditional interest of students to be free from physical interference and to exalt this interest to a constitutional absolute. This transformation is unwarranted; its inevitable effect will be to distract the federal courts from their proper business of protecting substantial federal rights. The Court of Appeals for the Third Circuit, sitting *en banc,* has recently expressed this concern in forceful terms:

> We are concerned that . . . the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of "trivialization" of the Constitution. If this should occur, some of the monumental accomplishments in defining fundamental human rights and liberties may be compromised, and the protections accorded those rights and liberties threatened.

Zeller v. *Donegal School District Board,* 517 F.2d 600, 607 (3rd Cir. 1975) (*en banc*) (footnote omitted).

In *Zeller,* which concerned student hair length regulations, the Court of Appeals recognized that the "very nature of the school system, public and private, requires that student liberties and freedom may not be absolute." *Id.,* 606. Applying the test stated by this Court in *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968), the Court of Appeals found that the asserted liberty interest did not rise to the dignity of a protectable constitutional interest because it did not directly and sharply implicate basic constitutional values. In such circumstances "the wisdom and experience of school authorities must be deemed superior and preferable to the federal judiciary's." *Zeller, supra* at 607.

Plaintiffs have failed to show that severe corporal punishment implicates any liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Their reliance on the Fourth Amendment is misplaced because that Amendment will not support the generalized right to be free from unjustified physical assault. Moreover, the interest in reputation which they contend is protected by the Fourteenth Amendment is both insufficient as a matter of law and trivial as a matter of fact. Even if plaintiffs were able to demonstrate a liberty interest in this case,

they would not be entitled to notice and hearing prior to its curtailment. In order for this Court to find that due process applied, plaintiffs would have to show that notice and hearing are consistent with the traditional protection of Fourth Amendment rights, the limited nature of children's and students' constitutional rights, and the deference which federal courts must accord to local school officials who represent the ultimate democratic authority. In short, plaintiffs would have to show that corporal punishment "directly and sharply implicate[s] basic constitutional values." *Epperson* v. *Arkansas,* 393 U.S. 97, 104 (1968). Because plaintiffs have failed to carry this burden, the judgment of the Court of Appeals must be affirmed.[8]

CONCLUSION

For the reasons set forth above, the Court of Appeals properly found that the use of severe corporal punishment as a method of school discipline neither constituted a cruel and unusual punishment, in violation of the Eighth Amendment, nor required notice and hearing prior to its use in order to satisfy the requirements of the Due Process

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[8] Significantly, the federal court is not the only forum open for relief in these circumstances. If specific disciplinary action is not privileged, or if it is overzealous, plaintiffs have an adequate remedy at state law.

The state courts afford a competent and fair tribunal to determine the plaintiffs' claims. State judges should not be presumed to be less competent or conscientious than federal judges in safeguarding personal liberties or upholding *federal* law. *Stone* v. *Powell,* ..... U.S. ....., 96 S.Ct. 3037, 3051-3052 n.35 (1976). Obviously, there is no reason to suppose that state courts will not fairly or competently adjudicate state law claims.

Clause of the Fourteenth Amendment. The National School Boards Association therefore respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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